

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Amendment of Part 95 of)
the Commission's Rules)

WT Docket No. 95-47
RM-8476

TO: The Commission

**REPLY COMMENTS OF
WIRELESS VENTURES, INC.**

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Wireless Ventures, Inc. ("WVI")¹, by its attorneys, hereby submits these Reply Comments in the above-captioned Notice of Proposed Rulemaking, FCC 95-158, released May 5, 1995 ("NPRM"). As discussed below, WVI supports the vast majority of commenters in requesting elimination of certain unnecessary technical restrictions, such as those pertaining to the duty cycle and to RTU maximum power levels. The purpose of these Reply Comments is to discuss the power of the Commission under the Administrative Procedure Act, 5 U.S.C. §§551 et seq. ("APA"), to promulgate new rules lifting those technical restrictions in this proceeding, without the delay involved in initiating a new and separate rulemaking proceeding.

¹ WVI is a partner in WVI Partners, which holds IVDS licenses for Akron, OH; Canton, OH; Cedar Rapids, IA; Waterloo-Cedar Falls, IA; and Iowa City, IA. Also, WVI was formed for the express purpose of providing management and consulting services to IVDS licensees. Thus, WVI has a material interest in the growth and viability of IVDS, and therefore in the outcome of this proceeding.

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I. Summary of NPRM and Initial Comments.

In the NPRM, the Commission proposes to allow Interactive Video and Data Service ("IVDS") licensees to offer mobile services only on an auxiliary basis and only to fixed service subscribers, thereby continuing to mandate the primary use of IVDS systems for fixed service. Id. at ¶8. Further, the Commission proposes to limit the ERP of the portable RTUs to 100 milliwatts and requests comment on the need to continue authorizing operation of fixed RTUs at 20 watts. NPRM at ¶8. The Commission also proposes to continue the existing 5-seconds-per-hour duty cycle currently applicable to fixed service and to apply that duty cycle to mobile services. Id. at ¶9.

The vast majority of commenters urge the Commission to eliminate the current restrictions on IVDS fixed service as well as on the proposed mobile service and allow IVDS licensees greater flexibility in providing services to subscribers in their service area. The commenters point out that the prohibition on interference with Channel 13 will provide the necessary restrictions on IVDS service without unnecessarily burdening the IVDS licensees. This rule making proceeding provides the Commission with an opportunity to revise the current rules as requested by the commenters, thereby providing IVDS licensees with the flexibility to utilize their IVDS frequencies fully and better serve the public.

The majority of initial commenters in this proceeding, including Concepts To Operations, Inc. ("CTO"), the Committee for Effective IVDS Regulation ("Committee"), and the National Action Group for IVDS ("NAG"), urge that the Commission permit IVDS licensees to provide mobile services to subscribers within the licensee's service area. Allowing IVDS licensees to provide both fixed and mobile services according to the needs of subscribers will assist in the development of the nascent IVDS industry. The majority of commenters state that maintaining many of the current technical restrictions on IVDS service will preclude the successful development of the IVDS industry and doom the FCC to a fiasco of defaults, non-construction, lack of service and reluctance of entrepreneurs to take risks in future spectrum auctions. See Comments of CTO; Comments of the Committee; Comments of NAG; Comments of IVDS Licensees.

II. The Commission Has the Procedural Authority to Adopt Different Rules from Those Proposed in the NPRM.

Although the Commission proposes certain specific changes to the IVDS Rules in the NPRM, the Commission is not limited to making only the changes proposed. See, e.g., Amateur Radio Service, 45 RR 2d 803 (Commission, 1979). In Amateur Radio Service, the Commission determined that it was "not limited to the action tentatively proposed in the NPRM" but could "also consider and adopt counterproposals or other proposals falling within the general purview of its published notice." 45 RR 2d at 805. The APA does not require an agency to publish in advance every precise

proposal which it may adopt as a rule. California Citizens Band Assoc. v. United States, 375 F.2d 43, 48 (9th Cir.) cert. denied 389 U.S. 844 (1967); see also Amateur Radio Service, 45 RR 2d at 805, citing Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1 (D.C. Cir. 1976), cert. denied., 426 U.S. 941 (1977); Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971); Logansport Broadcasting Corp. v. United States, 210 F.2d 24, 28 (D.C. Cir. 1954); Willapoint Oysters, Inc. v. Erving, 174 F.2d 676, 684-5 (9th Cir. 1949).

In Ethyl Corp., the Court of Appeals for the D.C. Circuit found that "nothing in Section 4 [of the APA] requires new notice whenever the agency responsibly adopts the suggestions of interested parties." 541 F.2d at 48. See also International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 632 (D.C. Cir. 1973) (stating that the submission of a proposed rule for comment does not automatically generate a new opportunity for comment merely because, partly in response to submissions, the rule promulgated by the agency differs from the rule it proposed). Indeed, the Court of Appeals in Logansport Broadcasting Corp. noted the absurdity of requiring the Commission to start the proceedings all over again each time it took account of a new factor. 210 F.2d at 28. The Court of Appeals further noted that "[i]f such were the rule the proceedings might never be terminated." Id. Thus, the Commission has the power to make the revisions to the IVDS Rules suggested by

the majority of the commenters without instituting a new rulemaking proceeding. WVI urges the Commission to do so.

III. The Commission's NPRM Provided Adequate Notice to Interested Parties.

The NPRM provided adequate notice to interested parties that the Commission was considering making broad changes to the IVDS Rules. The Commission has held adequate notice to be notice that is "sufficiently informative to alert interested persons and allow them to participate in the rulemaking process." Amateur Radio Service, 45 RR 2d at 805. Section 553 of the APA requires that "an agency [must] provide a published notice of its proposed rulemaking" and that "notice must include 'either the terms or substance of the proposed rule or a description of subject and issues involved.'" Aeronautical Radio, Inc. v. FCC, 68 RR 2d 1387, 1400 (D.C. Cir. 1991). In this proceeding, the Commission's NPRM gave an adequate description of the subject and issues involved and all interested persons were provided with adequate notice and an opportunity to participate in this rulemaking proceeding. Indeed, some twenty commenters filed comments. Of those commenters, the majority suggested and supported technical changes to the IVDS Rules which would provide IVDS licensees with greater operational flexibility.

IV. The Proposals Suggested by the Commenters are a Logical Outgrowth of the Commission's Rulemaking Proceeding.

The commenters responding to the NPRM almost uniformly urge the Commission to reduce the restrictions on both IVDS fixed and mobile services. If such an overwhelming majority of the commenters understood removal of these technical restrictions to have been put in issue, then removal of the restrictions must be a logical outgrowth of the Commission's rulemaking proposal. In Aeronautical Radio, Inc., the Court of Appeals for the D.C. Circuit reiterated that "the notice requirement [of the APA] is satisfied so long as the content of the agency's final rule is a 'logical outgrowth' of its rulemaking proposal." 68 RR 2d at 1400 citing United Steelworkers of America v. Marshall, 647 F.2d 1189, 1221 (D.C. Cir. 1980) cert. denied 453 U.S. 913 (1981). In this proceeding, the changes suggested by the majority of the commenters meet the "logical outgrowth" test.

V. Adoption of the Commenters' Proposals by the Commission Is in the Public Interest.

As stated in the NPRM, "[t]he public interest requires,... that [the Commission] retain the discretion and the responsibility to modify...service rules as the industry continues to evolve." Id. at 11. Thus, the Commission has the power to modify the IVDS Rules in order to provide IVDS licensees with the flexibility necessary for development of the service. It is clear from the majority of the comments, that the IVDS industry will not continue to evolve and develop unless the Commission makes the necessary changes to the rules.

Conclusion

For these reasons, WVI urges the Commission to eliminate the technical restrictions on fixed and mobile IVDS licenses to allow licensees greater operating flexibility. As discussed herein, this rule making proceeding provides the Commission with the opportunity to promulgate new IVDS Rules lifting the current technical restrictions and thereby ensuring the growth and expansion of the IVDS industry.

Respectfully submitted,
WIRELESS VENTURES, INC.

By: 
David J. Kaufman

By: 
Rhonda L. Neil

Brown Nietert & Kaufman,
Chartered
1920 N Street, N.W.
Suite 660
Washington, D.C. 20036
202-887-0600

Its Attorneys

July 11, 1995

CERTIFICATE OF SERVICE

I, Renee K. Kernan, a secretary in the law offices of Brown Nietert & Kaufman, Chartered, do hereby certify that I have on this 11th day of July, 1995, had copies of the foregoing "Reply Comments of Wireless Ventures, Inc." hand-delivered to the following:

Chairman Reed E. Hundt
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, D.C. 20554

Commissioner James H. Quello
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, D.C. 20554

Commissioner Andrew C. Barrett
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, D.C. 20554

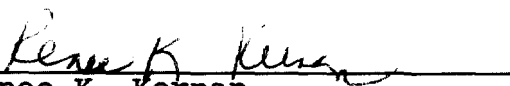
Commissioner Rachelle B. Chong
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, D.C. 20554

Regina Keeney, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5002
Washington, D.C. 20554

Jackie Chorney
Office of Plans and Policy
Federal Communications Commission
1919 M Street, N.W., Room 838-G
Washington, D.C. 20554

Eric Malinen
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5202
Washington, D.C. 20554


Renee K. Kernan